

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

|                                 |   |                             |
|---------------------------------|---|-----------------------------|
| BARBARA L. CROSBY,              | ) |                             |
|                                 | ) | No. CV-09-231-JPH           |
| Plaintiff,                      | ) |                             |
|                                 | ) | ORDER GRANTING DEFENDANT'S  |
| v.                              | ) | MOTION FOR SUMMARY JUDGMENT |
|                                 | ) |                             |
| MICHAEL J. ASTRUE, Commissioner | ) |                             |
| of Social Security,             | ) |                             |
|                                 | ) |                             |
| Defendant.                      | ) |                             |
|                                 | ) |                             |
|                                 | ) |                             |

---

BEFORE THE COURT are cross-motions for summary judgment noted for hearing without oral argument on July 9, 2010 (Ct. Rec. 14, 19). Attorney Maureen J. Rosette represents plaintiff; Special Assistant United States Attorney Franco Becia represents the Commissioner of Social Security (Commissioner). The parties have consented to proceed before a magistrate judge (Ct. Rec. 7). On June 30, 2010, plaintiff filed a reply (Ct. Rec. 22). After reviewing the administrative record and the briefs filed by the parties, the court **GRANTS** Defendant's Motion for Summary Judgment (Ct. Rec. 19) and **DENIES** Plaintiff's Motion for Summary Judgment (Ct. Rec. 14).

**JURISDICTION**

Plaintiff applied for disability insurance benefits (DIB) on November 14, 2005, alleging onset as of February 1, 2001, due to depression and anxiety (Tr. 106). The application was denied

1 initially and on reconsideration (Tr. 69-71, 74-75). At a hearing  
2 before Administrative Law Judge (ALJ) Paul Gaughen on June 29,  
3 2008, plaintiff, represented by counsel, plaintiff's spouse,  
4 Stephen Crosby, and vocational expert Sharon Welter testified (Tr.  
5 3-29). On May 23, 2008, the ALJ issued an unfavorable decision  
6 (Tr. 36-56). The Appeals Council denied review on July 13, 2009  
7 (Tr. 30-33). Therefore, the ALJ's decision became the final  
8 decision of the Commissioner, which is appealable to the district  
9 court pursuant to 42 U.S.C. § 405(g). Plaintiff filed this action  
10 for judicial review pursuant to 42 U.S.C. § 405(g) on July 29,  
11 2009 (Ct. Rec. 1,4.)

#### 12 **STATEMENT OF FACTS**

13 The facts have been presented in the administrative hearing  
14 transcripts, the ALJ's decision, the briefs of the parties, and  
15 are summarized here where relevant.

16 Plaintiff was 47 years old at onset and 54 at the hearing  
17 (Tr. 21). She graduated from high school, earned an associate's  
18 and bachelor's degree in business and communications, and is 14  
19 credits short of earning an M.A. degree (Tr. 6-7, 296). Ms. Crosby  
20 has worked as a mortgage clerk, administrative clerk, telephone  
21 solicitor, sales service promoter, sales/food products  
22 representative, and program manager (Tr. 20-21, 55-56). She last  
23 worked in February of 2001 (Tr. 7). Plaintiff suffers from  
24 depression and anxiety (Tr. 10, 20, 106, 292, 312, 372). She  
25 experiences anxiety when she has something new to do (Tr. 12), is  
26 unable to shop for groceries alone (Tr. 16); and has problems with  
27 concentration, memory, sleep, and fatigue (Tr. 9, 11, 16, 18-19).  
28 She sees a psychiatrist every six months (Tr. 10). Plaintiff

1 testified she can sit 30 minutes, stand 10, walk one block, and  
2 carry 20 pounds (Tr. 14-15).

### 3 SEQUENTIAL EVALUATION PROCESS

4 The Social Security Act (the "Act") defines "disability"  
5 as the "inability to engage in any substantial gainful activity by  
6 reason of any medically determinable physical or mental impairment  
7 which can be expected to result in death or which has lasted or  
8 can be expected to last for a continuous period of not less than  
9 twelve months." 42 U.S.C. §§ 423(d)(1)(A), 1382c(a)(3)(A). The Act  
10 also provides that a Plaintiff shall be determined to be under a  
11 disability only if any impairments are of such severity that a  
12 plaintiff is not only unable to do previous work but cannot,  
13 considering plaintiff's age, education and work experiences,  
14 engage in any other substantial gainful work which exists in the  
15 national economy. 42 U.S.C. §§ 423(d)(2)(A), 1382c(a)(3)(B).  
16 Thus, the definition of disability consists of both medical and  
17 vocational components. *Edlund v. Massanari*, 253 F.3d 1152, 1156  
18 (9<sup>th</sup> Cir. 2001).

19 The Commissioner has established a five-step sequential  
20 evaluation process for determining whether a person is disabled.  
21 20 C.F.R. §§ 404.1520, 416.920. Step one determines if the person  
22 is engaged in substantial gainful activities. If so, benefits are  
23 denied. 20 C.F.R. §§ 404.1520(a)(4)(I), 416.920(a)(4)(I). If not,  
24 the decision maker proceeds to step two, which determines whether  
25 plaintiff has a medically severe impairment or combination of  
26 impairments. 20 C.F.R. §§ 404.1520(a)(4)(ii), 416.920(a)(4)(ii).

27 If plaintiff does not have a severe impairment or combination  
28 of impairments, the disability claim is denied. If the impairment

1 is severe, the evaluation proceeds to the third step, which  
2 compares plaintiff's impairment with a number of listed  
3 impairments acknowledged by the Commissioner to be so severe as to  
4 preclude substantial gainful activity. 20 C.F.R. §§  
5 404.1520(a)(4)(ii), 416.920(a)(4)(ii); 20 C.F.R. § 404 Subpt. P  
6 App. 1. If the impairment meets or equals one of the listed  
7 impairments, plaintiff is conclusively presumed to be disabled.  
8 If the impairment is not one conclusively presumed to be  
9 disabling, the evaluation proceeds to the fourth step, which  
10 determines whether the impairment prevents plaintiff from  
11 performing work which was performed in the past. If a plaintiff is  
12 able to perform previous work, that Plaintiff is deemed not  
13 disabled. 20 C.F.R. §§ 404.1520(a)(4)(iv), 416.920(a)(4)(iv). At  
14 this step, plaintiff's residual functional capacity ("RFC")  
15 assessment is considered. If plaintiff cannot perform this work,  
16 the fifth and final step in the process determines whether  
17 plaintiff is able to perform other work in the national economy in  
18 view of plaintiff's residual functional capacity, age, education  
19 and past work experience. 20 C.F.R. §§ 404.1520(a)(4)(v),  
20 416.920(a)(4)(v); *Bowen v. Yuckert*, 482 U.S. 137 (1987).

21 The initial burden of proof rests upon plaintiff to establish  
22 a *prima facie* case of entitlement to disability benefits.  
23 *Rhinehart v. Finch*, 438 F.2d 920, 921 (9<sup>th</sup> Cir. 1971); *Meanel v.*  
24 *Apfel*, 172 F.3d 1111, 1113 (9<sup>th</sup> Cir. 1999). The initial burden is  
25 met once plaintiff establishes that a physical or mental  
26 impairment prevents the performance of previous work. The burden  
27 then shifts, at step five, to the Commissioner to show that (1)  
28 plaintiff can perform other substantial gainful activity and (2) a

1 "significant number of jobs exist in the national economy" which  
2 plaintiff can perform. *Kail v. Heckler*, 722 F.2d 1496, 1498 (9<sup>th</sup>  
3 Cir. 1984).

#### 4 STANDARD OF REVIEW

5 Congress has provided a limited scope of judicial review of a  
6 Commissioner's decision. 42 U.S.C. § 405(g). A Court must uphold  
7 the Commissioner's decision, made through an ALJ, when the  
8 determination is not based on legal error and is supported by  
9 substantial evidence. *See Jones v. Heckler*, 760 F.2d 993, 995 (9<sup>th</sup>  
10 Cir. 1985); *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
11 "The [Commissioner's] determination that a plaintiff is not  
12 disabled will be upheld if the findings of fact are supported by  
13 substantial evidence." *Delgado v. Heckler*, 722 F.2d 570, 572 (9<sup>th</sup>  
14 Cir. 1983)(citing 42 U.S.C. § 405(g)). Substantial evidence is  
15 more than a mere scintilla, *Sorenson v. Weinberger*, 514 F.2d 1112,  
16 1119 n. 10 (9<sup>th</sup> Cir. 1975), but less than a preponderance.  
17 *McAllister v. Sullivan*, 888 F.2d 599, 601-602 (9<sup>th</sup> Cir. 1989);  
18 *Desrosiers v. Secretary of Health and Human Services*, 846 F.2d  
19 573, 576 (9<sup>th</sup> Cir. 1988). Substantial evidence "means such  
20 evidence as a reasonable mind might accept as adequate to support  
21 a conclusion." *Richardson v. Perales*, 402 U.S. 389, 401 (1971)  
22 (citations omitted). "[S]uch inferences and conclusions as the  
23 [Commissioner] may reasonably draw from the evidence" will also be  
24 upheld. *Mark v. Celebrezze*, 348 F.2d 289, 293 (9<sup>th</sup> Cir. 1965). On  
25 review, the Court considers the record as a whole, not just the  
26 evidence supporting the decision of the Commissioner. *Weetman v.*  
27 *Sullivan*, 877 F.2d 20, 22 (9<sup>th</sup> Cir. 1989)(quoting *Kornock v.*  
28 *Harris*, 648 F.2d 525, 526 (9<sup>th</sup> Cir. 1980)).

1 It is the role of the trier of fact, not this Court, to  
2 resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If  
3 evidence supports more than one rational interpretation, the Court  
4 may not substitute its judgment for that of the Commissioner.  
5 *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579  
6 (9<sup>th</sup> Cir. 1984). Nevertheless, a decision supported by substantial  
7 evidence will still be set aside if the proper legal standards  
8 were not applied in weighing the evidence and making the decision.  
9 *Browner v. Secretary of Health and Human Services*, 839 F.2d 432,  
10 433 (9<sup>th</sup> Cir. 1987). Thus, if there is substantial evidence to  
11 support the administrative findings, or if there is conflicting  
12 evidence that will support a finding of either disability or  
13 nondisability, the finding of the Commissioner is conclusive.  
14 *Sprague v. Bowen*, 812 F.2d 1226, 1229-1230 (9<sup>th</sup> Cir. 1987).

#### 15 ALJ'S FINDINGS

16 At the onset ALJ Gaughen found plaintiff was insured through  
17 December 31, 2006 (Tr. 41). At step one he found Ms. Crosby has  
18 not engaged in substantial gainful activity since onset on  
19 February 1, 2001 (Tr. 41). At steps two and three, he found  
20 plaintiff suffers from severe musculoskeletal impairment to the  
21 right lower extremity due to tibia, fibula and malleolus fractures  
22 and status post debridement and fixation surgery, impairments that  
23 are severe but which do not meet or medically equal a Listing  
24 impairment (Tr. 41, 48). The ALJ found plaintiff less than  
25 completely credible (Tr. 50-52). At step four, relying on the VE,  
26 ALJ Gaughen found plaintiff is able to perform past relevant work  
27 as a mortgage clerk, telephone solicitor, sales service promoter,  
28 sales/food products representative, and program manager (Tr. 48,

1 55). Accordingly, the ALJ found plaintiff is not disabled as  
2 defined by the Social Security Act (Tr. 56). The ALJ's step four  
3 finding made step five unnecessary.

#### 4 **ISSUES**

5 Plaintiff contends the Commissioner erred first by failing to  
6 properly weigh the evidence of psychological impairment.  
7 Specifically, she alleges the ALJ improperly weighed the opinions  
8 of treating psychiatrist David Bot, M.D., and of examining  
9 professionals Paul Michels, M.D., and Dennis Pollack, Ph.D.,  
10 resulting in error at step two (Ct. Rec. 15 at 11-19). Second,  
11 plaintiff asserts the ALJ erred by failing to include Dr.  
12 Michels's assessed limitations in his questions to the VE at step  
13 four (Ct. Rec. 15 at 17-19). The Commissioner responds the ALJ  
14 appropriately weighed the evidence, including plaintiff's  
15 credibility, and correctly determined her RFC. The Commissioner  
16 asks the Court to affirm (Ct. Rec. 20 at 24).

#### 17 **DISCUSSION**

##### 18 **A. Weighing medical evidence - standards**

19 In social security proceedings, the claimant must prove the  
20 existence of a physical or mental impairment by providing medical  
21 evidence consisting of signs, symptoms, and laboratory findings;  
22 the claimant's own statement of symptoms alone will not suffice.  
23 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
24 on the basis of a medically determinable impairment which can be  
25 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
26 medical evidence of an underlying impairment has been shown,  
27 medical findings are not required to support the alleged severity  
28 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.

1 1991).

2 A treating physician's opinion is given special weight  
3 because of familiarity with the claimant and the claimant's  
4 physical condition. *Fair v. Bowen*, 885 F.2d 597, 604-05 (9<sup>th</sup> Cir.  
5 1989). However, the treating physician's opinion is not  
6 "necessarily conclusive as to either a physical condition or the  
7 ultimate issue of disability." *Magallanes v. Bowen*, 881 F.2d 747,  
8 751 (9<sup>th</sup> Cir. 1989)(citations omitted). More weight is given to a  
9 treating physician than an examining physician. *Lester v. Cater*,  
10 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1996). Correspondingly, more weight is  
11 given to the opinions of treating and examining physicians than to  
12 nonexamining physicians. *Benecke v. Barnhart*, 379 F.3d 587, 592  
13 (9<sup>th</sup> Cir. 2004). If the treating or examining physician's opinions  
14 are not contradicted, they can be rejected only with clear and  
15 convincing reasons. *Lester*, 81 F.3d at 830. If contradicted, the  
16 ALJ may reject an opinion if he states specific, legitimate  
17 reasons that are supported by substantial evidence. See *Flaten v.*  
18 *Secretary of Health and Human Serv.*, 44 F.3d 1435, 1463 (9<sup>th</sup> Cir.  
19 1995).

20 In addition to the testimony of a nonexamining medical  
21 advisor, the ALJ must have other evidence to support a decision to  
22 reject the opinion of a treating physician, such as laboratory  
23 test results, contrary reports from examining physicians, and  
24 testimony from the claimant that was inconsistent with the  
25 treating physician's opinion. *Magallanes v. Bowen*, 881 F.2d 747,  
26 751-52 (9<sup>th</sup> Cir. 1989); *Andrews v. Shalala*, 53 F.3d 1042-43 (9<sup>th</sup>  
27 Cir. 1995).

28 ///



1 **B. Step two**

2 In social security proceedings, the claimant must prove the  
3 existence of a physical or mental impairment by providing medical  
4 evidence consisting of signs, symptoms, and laboratory findings;  
5 the claimant's own statement of symptoms alone will not suffice.  
6 20 C.F.R. § 416.908. The effects of all symptoms must be evaluated  
7 on the basis of a medically determinable impairment which can be  
8 shown to be the cause of the symptoms. 20 C.F.R. § 416.929. Once  
9 medical evidence of an underlying impairment has been shown,  
10 medical findings are not required to support the alleged severity  
11 of symptoms. *Bunnell v. Sullivan*, 947 F.2d 341, 345 (9<sup>th</sup> Cr.  
12 1991).

13 An impairment or combination of impairments may be found "not  
14 severe only if the evidence establishes a slight abnormality that  
15 has no more than a minimal effect on an individual's ability to  
16 work." *Webb. Barnhart*, 433 F.3d 683, 686-687 (9<sup>th</sup> Cir. 2005)  
17 (citing *Smolen v. Chater*, 80 F.3d 1273, 1290 (9<sup>th</sup> Cir. 1996); see  
18 also *Yuckert v. Bowen*, 841 F.2d 303, 306 (9<sup>th</sup> Cir. 1988). If an  
19 adjudicator is unable to determine clearly the effect of an  
20 impairment or combination of impairments on the individual's  
21 ability to do basic work activities, the sequential evaluation  
22 should not end with the not severe evaluation step. S.S.R. No. 85-  
23 28 (1985). Step two, then, is "a de minimus screening device  
24 [used] to dispose of groundless claims," *Smolen*, 80 F.3d at 1290,  
25 and an ALJ may find that a claimant lacks a medically severe  
26 impairment or combination of impairments only when his conclusion  
27 is "clearly established by medical evidence." S.S.R. 85-28. The  
28 question on review is whether the ALJ had substantial evidence to

1 find that the medical evidence clearly established that the  
2 claimant did not have a medically severe impairment or combination  
3 of impairments. *Webb*, 433 F.3d at 687; see also *Yuckert*, 841 F.2d  
4 at 306.

5 Ms. Crosby primarily argues the ALJ erred at step two by  
6 failing to find depression and anxiety severe impairments. She  
7 alleges the ALJ failed to properly credit the following evidence:  
8 (1) plaintiff was psychiatrically hospitalized for three days  
9 [more than a year before onset], for an attempted prescription  
10 drug overdose in June 1999 (Ct. Rec. 15 at 12; Tr. 187, 189, 194);  
11 (2) Dr. Bot treated plaintiff for anxiety and depression from  
12 before onset on February 1, 2001, through August 6, 2007 (Ct. Rec.  
13 15 at 12-13; 15-17, citing Tr. 241-269, 317, 365, 367-368); (3)  
14 Dr. Michels diagnosed depressive disorder NOS [mild] in May 2006  
15 (Ct. Rec. 15 at 12-13; 16, 18-19, citing Tr. 292-299), and 4) in  
16 January 2008, Dr. Pollack diagnosed anxiety disorder NOS and  
17 dysthymic disorder with resulting marked and moderate limitations  
18 in functioning (Ct. Rec. 15 at 14, 17-18; Tr. 375, 377).

19 *1. Credibility*

20 To aid in weighing the conflicting medical evidence, the ALJ  
21 evaluated plaintiff's credibility and found her less than fully  
22 credible (Tr. 50, 52). Credibility determinations bear on  
23 evaluations of medical evidence when an ALJ is presented with  
24 conflicting medical opinions or inconsistency between a claimant's  
25 subjective complaints and diagnosed condition. *Webb v. Barnhart*,  
26 433 F.3d 683, 688 (9<sup>th</sup> Cir. 2005).

27 It is the province of the ALJ to make credibility  
28 determinations. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup> Cir.

1 1995). However, the ALJ's findings must be supported by specific  
2 cogent reasons. *Rashad v. Sullivan*, 903 F.2d 1229, 1231 (9<sup>th</sup> Cir.  
3 1990). Once the claimant produces medical evidence of an  
4 underlying medical impairment, the ALJ may not discredit testimony  
5 as to the severity of an impairment because it is unsupported by  
6 medical evidence. *Reddick v. Chater*, 157 F.3d 715, 722 (9<sup>th</sup> Cir.  
7 1998). Absent affirmative evidence of malingering, the ALJ's  
8 reasons for rejecting the claimant's testimony must be "clear and  
9 convincing." *Lester v. Chater*, 81 F.3d 821, 834 (9<sup>th</sup> Cir. 1995).

10 "General findings are insufficient: rather the ALJ must  
11 identify what testimony is not credible and what evidence  
12 undermines the claimant's complaints." *Lester*, 81 F.3d at 834;  
13 *Dodrill v. Shalala*, 12 F.3d 915, 918 (9<sup>th</sup> Cir. 1993).

14 The ALJ relied on plaintiff's activities inconsistent with  
15 the degree of impairment alleged (Tr. 50, 52). Plaintiff told Dr.  
16 Michels she attends about five church meetings a week. In  
17 addition, she serves in a door to door ministry lasting 6-9 hours,  
18 from three to four days a week (Tr. 297-298). The ALJ notes in  
19 March of 2006, Ms. Crosby cared for her nine month old infant  
20 grandson all day once a week (Tr. 44, 50, referring to Exhibits  
21 12F and 16F). After onset, plaintiff cared for a garden, shopped,  
22 did laundry, cooked, and vacuumed. About a year after onset, she  
23 traveled to Florida (Tr. 43-44, 46, 127, 245, 250, 317, 373).

24 The ALJ relied on evidence plaintiff's claim appears  
25 motivated by secondary gain rather than disability (Tr. 52). He  
26 observes Ms. Crosby told her treatment provider she does not want  
27 to work because it would interfere with church activities, and she  
28 enjoys not working (Tr. 52, 242). Significantly, he notes Ms.

1 Crosby waited until five years after onset before she applied for  
2 DIB, at a time when her spouse was reduced to working part time  
3 and to receiving retirement benefits (Tr. 52).

4 This was proper. See e.g., *Bruton v. Massanari*, 268 F.3d 824,  
5 828 (9<sup>th</sup> Cir. 2001)(leaving job because laid off rather than as a  
6 result of injury, and waiting until nine months after lay off to  
7 seek medical attention properly relied on as diminishing  
8 credibility). Error if any is clearly harmless, however, harmless  
9 because the ALJ's other reasons are clear, convincing, and  
10 supported by the evidence.

11 The ALJ relied on plaintiff's inconsistent statements, lack  
12 of consistent treatment, and symptoms effectively controlled with  
13 medication when he assessed credibility (Tr. 52). The ALJ compared  
14 plaintiff's testimony she does not shop alone (Tr. 16) with her  
15 statement to Dr. Michels she does all the household shopping (Tr.  
16 52, referring to Tr. 297). Similarly, the ALJ notes plaintiff  
17 testified she rarely does household chores but told health care  
18 providers she was capable of and did chores (Tr. 52; Tr. 297;  
19 373). Most significantly, the ALJ notes plaintiff's statements she  
20 sometimes spends all day in bed due to depression have not been  
21 reported to her treatment providers.

22 The ALJ notes plaintiff's mental health treatment for  
23 allegedly severe limitations has been "only periodic and  
24 intermittent," generally at six month intervals but at times with  
25 longer gaps. The ALJ points out plaintiff only saw Dr. Bot four  
26 times between September 2004 and the hearing on November 22, 2006  
27 (Tr. 51). ALJ Gaughen relied on primary care physician Allan  
28 Seely, M.D.'s July 2002 (more than a year after onset) and April

1 2003 opinions plaintiff's depression was well controlled with  
2 medication (Tr. 44, 51, referring to Exhibit 2F; Tr. 216, 221).

3 Inconsistent statements, inconsistencies between statements  
4 and conduct, and extent of daily activities diminish credibility.  
5 *Thomas v. Barnhart*, 278 F.3d 947, 958-959 (9<sup>th</sup> Cir. 2002). An  
6 "unexplained, or inadequately explained, failure to seek treatment  
7 or follow a prescribed course of treatment" can cast doubt on a  
8 claimant's sincerity. *Fair v. Bowen*, 885 F.2d 597,603 (9<sup>th</sup> Cir.  
9 1989). Evidence of conservative treatment is sufficient to  
10 discount a claimant's testimony regarding severity of an  
11 impairment. See *Parra v. Astrue*, 481 F.3d 742, 751 (9<sup>th</sup> Cir.  
12 2007), *cert. denied*, 552 U.S. 1141 (2008), *citing Johnson v.*  
13 *Shalala*, 60 F.3d 1428, 1434 (1995). Impairments that can be  
14 controlled effectively with medication are not disabling for the  
15 purpose of determining eligibility for benefits. *Warre v. Comm'r*  
16 *of Soc. Sec. Admin.*, 439 F.3d 1001, 1006 (9<sup>th</sup> Cir. 2006).

17 The ALJ's reasons for finding plaintiff less than fully  
18 credible are clear, convincing, and supported by substantial  
19 evidence.

## 20 2. Treating psychiatrist

21 ALJ Gaughen considered the contradicted opinions of Dr. Bot,  
22 plaintiff's treating psychiatrist before and after onset (Tr. 42,  
23 Exhibits 1F, 4F). Before onset, the ALJ notes Dr. Bot's records  
24 indicate plaintiff's anxiety and depression were likely  
25 exacerbated by relationship problems with her [former] spouse (Tr.  
26 42). The evidence includes a break-in by her estranged spouse in  
27 December 1999 (Tr. 259), violations of restraining orders in  
28 January of 2000 (Tr. 258), and financial stress including

1 bankruptcy filing ( Tr. 255, 260). The ALJ points out throughout  
2 the record, Dr. Bot treated plaintiff only intermittently. Before  
3 onset, plaintiff saw Dr. Bot in 1997 but did not return until May  
4 1999 (Tr. 187).

5 Three months after onset, in May 2001, Dr. Bot notes  
6 plaintiff is happy to be laid off work. Finances are not a problem  
7 due to an inheritance and unemployment. Plaintiff "witnesses" door  
8 to door for her church 70 hours a month. Recently she became  
9 engaged (Tr. 43; 254; Exhibit 4F).

10 Plaintiff returned to Dr. Bot five months later, in November  
11 of 2001. She felt better with a medication change and depression  
12 was milder overall. She was not working because her [current]  
13 spouse "told her she did not have to" (Tr. 43, 253). In January  
14 2002, Dr. Bot again notes plaintiff enjoys not working (Tr. 43,  
15 252).

16 Ms. Crosby saw Dr. Bot in October 2002. She returned eight  
17 months later, in June 2003. There is a nine month gap in treatment  
18 Between September 2004 and June 2005 (Tr. 43). In June 2005,  
19 plaintiff says she does not need to work. If she became employed,  
20 it would mean giving up some service to the church, a result she  
21 does not want (Tr. 43; Exhibit 4F). Plaintiff's last appointments  
22 with Dr. Bot were in October 2005, June 2006, and June 2007 (Tr.  
23 241, 317, 365).  
24 (Tr. 42-43; Exhibit 1F).

25 In October 2005 plaintiff performs service for her church  
26 three days a week from 5 am to 1 pm. She declines trying a new  
27 psychotropic drug. Medications are adjusted. On October 26, 2005,  
28 her mood and energy are better (Tr. 241).

1 In June 2006, plaintiff only occasionally takes anxiety  
2 medication; she "does not feel bad." Ms. Crosby witnesses for her  
3 church three days a week (Monday, Wednesday, and Friday) and cares  
4 for her grandson on Tuesdays, both activities she enjoys (Tr.  
5 317). A year later, in June 2007, plaintiff has the same four day  
6 schedule. In addition, she attends five Bible study groups a week.  
7 Dr. Bot diagnoses mild depression and schedules a yearly  
8 medication check (Tr. 365).

9 Surprisingly, Dr. Bot assessed several moderate limitations.  
10 This is inconsistent with his own treatment notes indicating  
11 plaintiff is busy, content, and does not wish to work. *See Morgan*  
12 *v. Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 603 (9<sup>th</sup> Cir. 1999).  
13 The limitations are also inconsistent with Dr. Bot's diagnosis of  
14 mild depression (Tr. 365).

15 The ALJ found Ms. Crosby's activities are inconsistent with  
16 Dr. Bot's assessed moderate impairment in the ability to maintain  
17 attention and concentration for extended periods (Tr. 367). As  
18 noted, plaintiff appears to maintain attention and concentration  
19 at least four days a week. She regularly attends study groups with  
20 no reported difficulty. Tests reveal no impairment in these areas.  
21 Similarly, these activities are inconsistent with Dr. Bot's  
22 assessed moderate limitations in the ability to perform activities  
23 within a schedule, and with assessed mild to moderate limitations  
24 in the ability to complete a normal work day and perform at a  
25 consistent pace (Tr. 367). The ALJ's reason is specific and  
26 legitimate. *Andrews v. Shalala*, 53 F.3d 1035, 1041 (9<sup>th</sup> Cir.  
27 1995).

28 The ALJ notes plaintiff only sought treatment with Dr. Bot

1 infrequently, another reason undermining Dr. Bot's opinion Ms.  
2 Crosby suffers more than mild limitations. *See Burch v. Barnhart*,  
3 400 F.3d 676 (9<sup>th</sup> Cir. 2005); *Bayliss v. Barnhart*, 427 F.3d 1211,  
4 1216 (9<sup>th</sup> Cir. 2005).

5 Dr. Bot opined plaintiff is moderately limited in the ability  
6 to respond appropriately to changes in the workplace (Tr. 368).  
7 The ALJ modified Dr. Bot's assessed limitation and opined  
8 plaintiff is mildly or slightly limited in the capacity to adapt  
9 to change (Tr. 22).

### 10 3. Examining psychiatrist

11 The ALJ considered the contradicted May 2006 opinion of  
12 examining psychiatrist Dr. Michels (Tr. 53, referring to Tr. 292-  
13 299) and found his assessed GAF of 65-70, indicating mild  
14 impairment, was consistent with the bulk of the record (Tr. 53).  
15 The ALJ observes the claimant

16 was adamant that her conditions were not severe  
17 enough to cause her to see Dr. Bot more than her  
18 established twice a year visits and that overall  
19 she was doing fairly well. Claimant reported to  
20 Dr. Michels that she slept 6-7 hours a night and  
21 would occasionally nap but made no indication that  
22 she was incapable of getting out of bed on a  
23 regular basis due to her depressive symptoms. The  
24 undersigned agrees with Dr. Michels' conclusion  
25 that the claimant's reported depressive symptoms  
26 were inconsistent with her repeatedly reported  
27 day to day activities.

28 (Tr. 53; Exhibit 7F; Tr. 299).

29 The ALJ refers to plaintiff's reports she sometimes stays in  
30 bed and does not eat or shower for days (Tr. 146), as noted a  
31 report she has not made to health care providers (Tr. 53).

### 32 4. Examining psychologist

33 ALJ Gaughen considered the contradicted opinion of examining  
34 psychologist Dr. Pollack, who examined plaintiff almost two years



1 after Ms. Crosby's last insured date (Tr. 54; 370-379). Dr.  
2 Pollack assessed plaintiff as markedly limited in the ability to  
3 complete a normal workday or workweek and moderately limited in  
4 the ability to perform within a schedule (Tr. 377). He notes Ms.  
5 Crosby's test scores are lower than expected for someone with a  
6 college degree and her work history (Tr. 375). The ALJ rejects  
7 this assessment because it is unsupported by Dr. Pollack's (and  
8 Dr. Michels's) testing. Dr. Pollack's assessed GAF of 60 is "one  
9 point from being classified as a mild impairment," similar to Dr.  
10 Michels's assessed GAF of 65-70 indicating only mild impairment.  
11 And the ALJ notes Dr. Pollack fails to indicate when the assessed  
12 limitations began or will end. The ALJ's reason is highly relevant  
13 because Dr. Pollack examined plaintiff almost two years after her  
14 last insured date.

15 To the extent the ALJ rejected the contradicted opinions of  
16 some of the professionals, his reasons are legitimate, specific,  
17 and supported by substantial evidence in the record. See *Lester v.*  
18 *Chater*, 81 F.3d 821, 830-831 (9<sup>th</sup> Cir. 1995)(the ALJ must make  
19 findings setting forth specific, legitimate reasons for rejecting  
20 the treating or examining physician's contradicted opinion).

21 The ALJ is responsible for reviewing the evidence and  
22 resolving conflicts or ambiguities in testimony. *Magallanes v.*  
23 *Bowen*, 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989). It is the role of the  
24 trier of fact, not this court, to resolve conflicts in evidence.  
25 *Richardson*, 402 U.S. at 400. The court has a limited role in  
26 determining whether the ALJ's decision is supported by substantial  
27 evidence and may not substitute its own judgment for that of the  
28 ALJ, even if it might justifiably have reached a different result

1 upon de novo review. 42 U.S.C. § 405 (g).

2 The record supports the ALJ's step two determination  
3 plaintiff suffers mild psychological impairments, that is,  
4 impairments no more than mildly affecting her ability to perform  
5 work-like activities. The ALJ's credibility determination and  
6 weighing of the other evidence is based on substantial evidence  
7 and free of legal error.

8 **C. Hypothetical**

9 Plaintiff alleges the ALJ should have included in his  
10 hypothetical the more severe limitations assessed by Drs. Bot and  
11 Pollack (Ct. Rec. 15 at 18-19). As noted, the ALJ properly weighed  
12 the opinion and other evidence. His RFC is supported by the record  
13 and free of error.

14 **CONCLUSION**

15 Having reviewed the record and the ALJ's conclusions, this  
16 court finds that the ALJ's decision is free of legal error and  
17 supported by substantial evidence..

18 **IT IS ORDERED:**

19 1. Defendant's Motion for Summary Judgment (**Ct. Rec. 19**) is  
20 **GRANTED.**

21 2. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 14**) is  
22 **DENIED.**

23 The District Court Executive is directed to file this Order,  
24 provide copies to counsel for the parties, **enter judgment in favor**  
25 **of Defendant**, and **CLOSE** the file.

26 DATED this 9th day of August, 2010.

27 s/ James P. Hutton  
JAMES P. HUTTON  
28 UNITED STATES MAGISTRATE JUDGE